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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

E.I. DU PONT DE NEMOURS AND COMPANY,
Petitioner,
v.
BARBARA R. SHERIDAN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council (EEAC) respectfully submits this brief as *amicus curiae*. The written consent of all parties has been filed with the Clerk of this Court. The brief supports the petition for a writ of certiorari.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes nearly 300 major U.S. corporations, as well as several industry associations that, in turn, have hundreds of corporate members. EEAC's directors and officers include many of industry's foremost experts in the field of equal employ-

ment opportunity. Their combined experience gives EEAC valuable insight into the practical, as well as legal, issues surrounding the proper interpretation and application of fair employment laws and policies. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

EEAC's members, and the constituents of its association members, are all employers subject to Title VII of the Civil Rights Act of 1964, as well as other employment laws and regulations. As employers, and as potential respondents to employment discrimination claims, EEAC's members want to ensure their comprehension of and compliance with all applicable anti-discrimination laws.

Thus, the issues presented in the petition are extremely important to the nationwide employer constituency that EEAC represents. The Court of Appeals below held that once a plaintiff sets forth a prima facie case and introduces evidence that would allow disbelief of defendant's articulated non-discriminatory reasons, a jury is always permitted to draw an inference of intentional discrimination. Accordingly, a plaintiff may prevail without presenting any evidence of the ultimate issue of fact: whether the employer intentionally discriminated on the basis of a protected characteristic. This holding is contrary to this Court's decisions in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981) and *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, as well as to common sense. Allowing this decision to stand will undercut the rule of law and the burden of proof analysis established by the *McDonnell Douglas-Burdine-Hicks* trilogy and may prevent employers from making intelligent and informed employment decisions without fear of litigation in the future.

Because of its interest in the application of the nation's fair employment laws, EEAC has filed briefs as *amicus*

curiae in a variety of cases before this Court, the United States Courts of Appeals, and various state supreme courts. As part of this *amicus* activity, EEAC has briefed a number of other cases before this court involving the standard of proof in intentional discrimination cases, including *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977); *Furnco Construction Corp. v. Waters,* 438 U.S. 567 (1978); *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981); *U.S. Postal Service Board of Governors v. Aikens,* 460 U.S. 711 (1983), and *St. Mary's Honor Center v. Hicks,* 509 U.S. 502 (1993).

Thus, EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of its experience in these matters, EEAC is well situated to brief the Court on the implications of the issues beyond the immediate concerns of the parties to the case.

This brief is timely as it is being filed within the time allowed in Supreme Court Rule 37.2 for filing a brief in support of the petition for a writ of certiorari.

STATEMENT OF THE CASE

The plaintiff filed a complaint against her former employer, the Hotel du Pont, pursuant to Title VII of the Civil Rights Act, 42 U.S.C. 2000e *et seq.* Specifically, plaintiff claimed that defendant had intentionally discriminated against her because of her gender by failing to promote her, retaliating against her for complaining about gender discrimination and, ultimately, by constructively discharging her.

Following a six day jury trial, the jury found for defendant on the issues of promotion and retaliation, but found for plaintiff on the constructive discharge claim and awarded her $17,500.00, in addition to back pay. Following post trial motions, the district court ruled for defend-

ant on the constructive discharge claim, stating that even if defendant's proffered reasons were false, plaintiff had failed to present any evidence that her gender played a role. (Pet. App. 125a).

On appeal, a panel of the Third Circuit reversed the district court, relying on the statement in *Hicks* that the "rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination" and the Third Circuit's earlier precedent that " 'if the plaintiff has pointed to evidence sufficient[] to discredit the defendant's proffered reasons, to survive summary judgment the plaintiff need not also come forward with additional evidence of discrimination beyond his or her prima facie case.' " (Pet. App. 87a). On rehearing *en banc,* the entire Third Circuit, with one judge concurring in part and dissenting in part, likewise reversed the district court's judgment and remanded the case for a determination on defendant du Pont's motion for a new trial.

In so doing, the Third Circuit concluded that the Supreme Court's decision in *St. Mary's Honor Center v. Hicks,* 509 U.S. 502 (1993), allows a plaintiff to "survive summary judgment (or in this case judgment as a matter of law) if the plaintiff produce[s] sufficient evidence to raise a genuine issue of fact as to whether the employer's proffered reasons were not its true reasons for the challenged employment action." (Pet. App. 14a). It established a rule that disbelief in the employer's articulated reasons was sufficient to survive a motion for summary judgment or judgment as a matter of law, even without proof of intentional discrimination.

SUMMARY OF REASONS FOR GRANTING THE WRIT

Since this Court issued its decision regarding the burdens of proof and sufficiency of the evidence in *St. Mary's Honor Center v. Hicks,* 509 U.S. 502 (1993), all twelve

circuits have reviewed this Court's analysis and have applied it to employment discrimination cases. Unfortunately, despite the optimistic prediction of this Court that there would not be confusion among the circuits, there is a definite and distinct split revolving around one small, but apparently ambiguous word: the word "may" in this Court's statement that a factfinder's disbelief "may, together with the elements of the prima facie case, suffice to show intentional discrimination." *Hicks,* 509 U.S. at 511.

Does "may" mean that a factfinder is completely free to find discrimination, even in the absence of proof of the ultimate issue, as the Third Circuit concluded? Or, as *amicus curiae* and several other circuits submit is the proper definition, does "may" mean that in some instances a prima facie case in addition to the evidence of pretext submitted by a plaintiff is sufficient to permit a finding of discrimination without requirement of additional proof? In short, does the word "may" mean "always can" or "sometimes not?"

The division in the circuits creates confusion for employers and employees alike. Can a plaintiff survive a motion for summary judgment in the First Circuit merely by contending that employer's reason is unbelievable? Is summary judgment completely unavailable to employers in the Ninth Circuit, once a plaintiff says the employer's reason is false? If, as the Court of Appeals contends, once the plaintiff presents evidence sufficient to create disbelief in employer's articulated reason, the jury may always find discrimination, what role does the trial court play? By equating disbelief or pretext with a finding of discrimination, the Court of Appeals nullifies the experience and discretion of the trial court and forecloses employers from utilizing motions for summary judgment or judgment as a matter of law as artillery in their defense. Because the circuits continue to grapple with these recur-

ring issues, and reach conflicting results, both between and among themselves, this Court should grant the writ to define its terms and provide needed clarification.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION, WHICH ALLOWS A PLAINTIFF TO SURVIVE A MOTION FOR SUMMARY JUDGMENT OR FOR JUDGMENT AS A MATTER OF LAW MERELY BY QUESTIONING THE EMPLOYER'S ARTICULATED BUSINESS REASON WITHOUT PROVING THAT THE REAL REASON WAS A "PRETEXT FOR" DISCRIMINATION, CONFLICTS DIRECTLY WITH DECISIONS OF THE FIRST, FIFTH AND EIGHTH CIRCUITS

A. The Main Issue of Discordance Among the Circuits and the Conflict the Third Circuit Has With *Hicks* Is Based Upon the Definition of the Word "May" As It Pertains to the Sufficiency of the Evidence

While all of the circuits have engaged in mental gymnastics to apply this Court's decision in *Hicks,* the nub of the problem falls to one small word within one oft-cited passage: "may."

In concurring in the denial of rehearing *en banc* in *Barbour v. Merrill,* 48 F.3d 1270 (D.C. Cir. 1995), *cert. dismissed,* 116 S.Ct. 1037 (1996), Judge Williams of the District of Columbia Circuit, joined by Judges Silberman and Ginsburg, identified the problem the circuits are having:

> I do not construe the panel opinion to read *St. Mary's Honor Ctr. v. Hicks,* —— U.S. ——, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), as saying that every factfinder is free to find discrimination *in every case* where the plaintiff has established a prima facie case and offered evidence sufficient to disprove the defendant's attempted rebuttal. The Court wrote:
>
> > "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of men-

> dacity) *may*, together with the elements of the prima facie case, suffice to show discrimination."
>
> *Id.*, at —, 113 S.Ct. at 2749 (emphasis added). The word "may" is ambiguous. It might mean that the factfinder is completely free to find discrimination, in the sense that an appellate court could never reverse such a decision on the evidence. Alternatively, it might mean that in some cases the combination will be adequate to sustain a finding of discrimination, in others not, to be determined by a factfinder initially, and the appellate court on review, according to the usual principles.

Barbour, 48 F.3d at 1281. Regrettably, the Third Circuit has seized upon the ambiguity observed by Judge Williams and has interpreted it so as to abdicate the court's function of ruling on the sufficiency of the evidence. It is this ambiguity that this Court must address.

B. A Decisive Split Between the Circuits Continues, As Each Circuit Grapples With This Court's Decision in *Hicks*

All of the circuits have decided the issue regarding the sufficiency of the evidence a plaintiff must present to avoid a motion for summary judgment or judgment as a matter of law in light of this Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). Despite this Court's sanguine prediction that no confusion should result from its decision in *Hicks*, the courts of appeals have failed to comprehend consistently this Court's instruction on the burden and sufficiency of evidence in employment cases.

The decision by the Third Circuit directly conflicts with decisions in three other circuits, the First, Fifth and Eighth, as well as various panels within the Second and Fourth Circuits.[1] Moreover, while a number of other

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[1] *Woods v. Friction Materials*, 30 F.3d 255, 260 (1st Cir. 1994) ("[P]laintiff must produce sufficient evidence, direct or indirect, to show that the reasons advanced by the employer constitute a

circuits have decided, as the Third Circuit did here, that pretext alone is sufficient to avoid summary judgment or judgment as a matter of law,[2] they too have expressed

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mere pretext for unlawful discrimination."); *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1996) (*en banc*); *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328 (8th Cir. 1996) ([P]laintiff can avoid summary judgment only if the evidence considered in its entirety (1) creates a fact issue as to whether the employer's proffered reasons are pretextual and (2) creates a reasonable inference that age was a determinative factor in the adverse employment decision."); *See also, Fisher v. Vassar College*, 70 F.3d 1420, 1437 (2d Cir. 1995) ("[T]he finding of pretext here did not alone justify a finding of discrimination."); *Jiminez v. Mary Washington College*, 57 F.3d 369 (4th Cir.), cert. denied, 116 S.Ct. 380 (1995) ("[R]ejection of the defendant's proffered reason—standing alone—does not compel the ultimate conclusion that the defendant unlawfully discriminated against the plaintiff . . . .").

[2] *See Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995) ("[P]laintiff need only establish a prima facie case and introduces evidence sufficient to discredit plaintiff's proffered nondiscriminatory reasons;"); *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1083 (6th Cir. 1994) ("*Hicks* clarified that the only effect of the employer's non-discriminatory explanation is to convert the inference of discrimination based upon the plaintiff's prima facie case from a mandatory one . . . to a permissive one. . . ."); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1124 (7th Cir. 1994) ("[F]or summary judgment purposes, the non-moving party, in this case the plaintiff, has a lesser burden. He must only 'produce evidence from which a rational factfinder could infer that the company lied.'"); *Washington v. Garrett*, 10 F.3d 1421 (9th Cir. 1993) ("Because, as *St. Mary's* recognizes, the factfinder in a Title VII case is entitled to infer discrimination from plaintiff's proof of a prima facie case and showing of pretext without anything more, there will always be a questions for the factfinder once a plaintiff establishes a prima facie case and raises a genuine issue as to whether the employer's explanation for its action is true."); *Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995) ("Consequently, because a jury may find illegal discrimination upon nothing more than a prima facie case and pretext, such a showing at the summary judgment stage is sufficient to get the case to the jury.") (footnote omitted); *Combs v. Meadowcraft, Inc.*, No. 95-6922, 1997 U.S. App. LEXIS 3028 (11th Cir. Feb. 20, 1997).

some internal misgivings.[3] Because there is such confusion on this issue, it is ripe for this Court to review. While some issues may benefit from additional "seasoning" within the various circuits until all of them conclude decisively, this is an issue of semantics that requires the attention of this Court. While this Court's "dissection of the sentences of United States Reports" is not the most desirable of duties, the circuits' failure to discern this Court's meaning is grossly apparent and in need of immediate resolution. *Hicks,* 509 U.S. at 515.

II. THE THIRD CIRCUIT MISAPPREHENDED THE DECISION IN *HICKS* BY FOCUSING ON THE EVIDENCE OF PRETEXT RATHER THAN THE ULTIMATE ISSUE OF DISCRIMINATORY CONDUCT

A. While Several Circuits Have Found That Evidence of Pretext or Disbelief May Help a Plaintiff To Avoid a Motion for Summary Judgment or To Survive a Motion for Judgment As a Matter of Law, These Circuits Have Properly Held That Plaintiff Must Adduce Evidence That the Employer's Reasons Were a Pretext for Discrimination

Can the plaintiff's prima facie case plus evidence of a pretext be sufficient to allow a plaintiff to get to a jury, or must a plaintiff adduce additional evidence beyond the prima facie case and evidence of a pretext? The answer to both questions, under a proper construction of *Hicks* is yes, *in some cases.*

> [T]he Supreme Court envisioned that some cases exist where a prima facie case and the disbelief of a pretext *could* provide a strong enough inference of actual discrimination to permit the fact-finder to find for the plaintiff. Conversely, we do not think that

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[3] *Emmel v. Coca-Cola Botting Company,* 95 F.3d 627, 634, n.3 (7th Cir. 1996) (citations omitted) ("While we permit this inference [jury's prerogative to disbelieve uncontradicted testimony], we note that the argument that a jury might not believe the proffered legitimate business reason is not enough to defeat summary judgment.")

> the Supreme Court meant to say that such a finding would always be permissible . . . . The strength of the prima facie case and the significance of the disbelieved pretext will vary from case to case depending on the circumstances. In short, everything depends on the individual facts.

Woods v. Friction Materials, 30 F.3d 255, 261 n.3 (1st Cir. 1994) (emphasis in original). It is this factually specific examination which the Third Circuit seeks to avoid, and it is its unwillingness to have courts engage in case by case factual analysis which this Court must now address.

While this Court recognized that, in certain cases, the prima facie case in conjunction with the evidence of pretext is sufficient to permit the trier of fact to infer the ultimate fact of discrimination, it also recognized that such evidence "may not" always be sufficient. The plaintiff must provide evidence that will "suffice to show intentional discrimination." Only where the plaintiff has set forth prima facie evidence in conjunction with evidence of employer's pretext, which when considered together may allow a reasonable jury to conclude that employer has intentionally discriminated against the employee, will "no additional proof be required." *Hicks,* 509 U.S. at 511. Indeed, a plaintiff's evidence of pretext might perform "double duty" by "serv[ing] the additional purpose of permitting an inference that [unlawful] discrimination was a motivating factor in a plaintiff's termination." *Kehoe v. Anheuser-Busch, Inc.,* 96 F.3d 1095, 1102 (8th Cir. 1996) (*citing Nelson v. Boatmen's Bancshares,* 26 F.3d 796, 800, 801 (8th Cir. 1994). Whether the plaintiff has presented such evidence is a factually specific determination which must be decided on a case by case basis.

In a recent *en banc* decision, the Fifth Circuit considered the "sufficiency of the evidence" question in light of this Court's holding in *Hicks* and properly required the plaintiff to adduce some evidence that the employer's articulated reasons were a pretext for discrimination in

order to get to the jury and to have a jury verdict upheld. *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996) (*en banc*). In *Rhodes*, a jury had found for plaintiff on his age discrimination case. Guiberson Oil appealed the judgment on grounds of insufficient evidence. A split panel of the Fifth Circuit reversed the judgment and found for Guiberson Oil. The Fifth Circuit reheard the case *en banc* "to consider the sufficiency question in light of the Supreme Court's recent decision in *St. Mary's Honor Center v. Hicks*, —— U.S. ——, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993)." *Rhodes*, 75 F.3d at 992.

In reviewing the entire record and recognizing generally plaintiffs' need for and reliance upon circumstantial evidence and inferences in most employment discrimination cases, the Fifth Circuit made the following determination:

> [A] plaintiff can avoid summary judgment and judgment as a matter of law if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable inference that age was a determinative factor in the actions of which employee complains. The employer, of course, will be entitled to summary judgment if the evidence taken as a whole would not allow a jury to infer that the actual reason for the discharge was discriminatory.

Rhodes, 75 F.3d at 994.

Similarly, the Eighth Circuit (from which *Hicks* came), also requires plaintiff to create an issue of fact as to whether employer's proffered reasons are pretextual and to create an inference that the protected characteristic was a determinative factor. This view acknowledges the middle ground forged by this Court when it stated in *Hicks* that the factfinder's disbelief of the employer's explanation may, together with the prima facie case, suffice to show intentional discrimination. It is also consistent with the notion that the burden of persuasion as to the ultimate issue of intentional discrimination remains with the plaintiff at all times and that this burden is not necessarily

satisfied merely by discrediting the employer's explanation. *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328, 1336-37 (8th Cir. 1996). "The focus, however, always remains on the ultimate question of law: whether the evidence is sufficient to create a genuine issue of fact as to whether the employer intentionally discriminated against plaintiff." *Id.*

B. By Focusing on the Evidence of Pretext Rather Than the Ultimate Issue of Discriminatory Conduct, the Third Circuit Misapplied *Hicks* and Revived the "Pretext Only" Rubric for Plaintiffs Seeking To Avoid Summary Judgment or Judgment As a Matter of Law

The Third Circuit concluded that evidence sufficient to discredit an employer's articulated reason will always suffice to withstand an attack by an employer on the sufficiency of the evidence, either by summary judgment motion or motion for judgment as a matter of law. The Third Circuit misstated this Court's decision in *Hicks* and construed it precisely as Judge Williams of the D.C. Circuit chose not to, holding that whenever a jury can disbelieve an employer's reason for its action, then the evidence is, *a priori*, sufficient to support a finding of discrimination.

> In granting judgment as a matter of law for DuPont, the district court stated that "plaintiff would have to point to some evidence" that gender was the motive of those in the decisionmaking process. It is evident that the district court believed that something more was required than was set forth in *Hicks* and our cases. Not only was such a requirement of additional evidence rejected in *Fuentes* where we stated that "if the plaintiff has pointed to evidence sufficiently to discredit the defendant's proffered reasons, to survive summary judgment the plaintiff need not come forward with additional evidence of discrimination beyond his or her prima facie case." 32 F.3d at 764, but it is also inconsistent with the state-

> ment in *Hicks* that upon rejection of defendants' proffered reasons for the action, "no additional proof of discrimination is required." 509 U.S. 511, 113 S.Ct. at 2749 (internal quotations omitted).

(Pet. App. at 24a). *Hicks* does not and cannot support the Third Circuit's conclusion.

> We have no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate factfinder determines, according to proper procedures, *that the employer has unlawfully discriminated.* . . . But nothing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's action was not believable.

Hicks, at 514 (emphasis in original).

In *Hicks,* this Court sought to resolve a circuit split regarding the proof an employee had to set forth to prevail in a Title VII discrimination claims. Prior to *Hicks,* there were two general schools of thought: "pretext-only" and "pretext-plus." Simply stated, in "pretext-only" circuits, "[o]nce a plaintiff proved all of defendants' proffered reasons for the adverse employment actions to be pretextual, plaintiff was entitled to judgment as a matter of law." *Hicks v. St. Mary's Honor Ctr.*, 970 F.2d 487, 492 (8th Cir. 1992). "Pretext-plus" circuits required more than a showing of falsity of employer's proffer. They needed proof of discriminatory animus. *Bienkowski v. American Airlines,* 851 F.2d 1503, 1508, n.6 (5th Cir. 1988) ("There must be some proof that [age] motivated the employer's action, otherwise the law has been converted from one preventing discrimination because of [age] to one ensuring dismissals only for "just cause" to all people over 40.").

In resolving this burden of proof conflict, this Court reviewed its earlier decisions and found that once an employer succeeds in asserting its nondiscriminatory rea-

sons, the presumption created by the prima facie proof drops from the case and "the factual inquiry proceeds to a new level of specificity." *Hicks*, 509 U.S. at 515-517, *citing Burdine*, 450 U.S. at 253. The trier of fact then proceeds to the ultimate issue: whether the employee has proven that the employer intentionally discriminated against her because of her gender. This Court specifically rejected the "pretext only" school of thought by explaining that disbelief of the employer's reasons does not compel judgment for plaintiff. Rather, once the employer has articulated its non-discriminatory reason, "the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Hicks*, 509 U.S. at 515-17, *citing Burdine*, 450 U.S. at 253.

In a rigorous discourse on the issue of pretext, this Court pointed out the fallacy of the argument *that because the stated reason was false, then the true reason must be discriminatory* and concluded that "A reason cannot be proved to be 'a pretext for *discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *Hicks*, 509 U.S. at 515-517. In its decision below, however, the Third Circuit ignored this explicit conclusion and, in likening pretext to flight from crime, presumed its own:

> If the employer fails to come forth with the true and credible explanation and instead keeps a hidden agenda, it does so at its own peril. Under those circumstances, there is no policy to be served by refusing to permit the jury to infer that the real motivation is the one that the plaintiff has charged.

(Pet. App. at 21a).

III. BY MAKING EVIDENCE OF PRETEXT OR DISBELIEF OF AN EMPLOYER'S ARTICULATED REASON AN "AUTOMATIC BYE," GUARANTEEING A TRIAL BY JURY, THE COURT OF APPEALS EVISCERATED RULES 50 AND 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE, NULLIFIED THE GATEKEEPING FUNCTION OF THE TRIAL COURT, AND ABDICATED ITS OWN RESPONSIBILITY TO ENSURE THAT JUDGMENTS ARE BASED ON LEGALLY SUFFICIENT EVIDENCE

A. The Decision of the Third Circuit Eviscerates Rules 56 and 50 of the Federal Rules of Civil Procedure by Elevating the Issue of Employer's Articulated Reasons to the Ultimate Issue of Fact

Once a plaintiff presents some evidence by which the employer's articulated reason might be disbelieved, can an employer avail itself of a motion for summary judgment or motion for judgment as a matter of law? More importantly, may the trial court, in its discretion and experience, enter judgment for employer as a matter of law, once plaintiff adduces such evidence? The answer to both, according to the Third Circuit, is no. In its decision, the Third Circuit concluded that evidence of pretext or disbelief of employer's reasons is always sufficient for a plaintiff's case to proceed to trial and to survive any post-trial attacks or appeals by employers.

By elevating the correctness or believability of the employer's articulated reason to the ultimate issue to be tried by the jury, the Third Circuit precludes a trial court from ruling whether the evidence is sufficient to support a finding of discrimination and allows all claims to proceed to a jury determination and to be upheld post trial and on appeal. The ultimate issue becomes the correctness of employer's reason, not discrimination *vel non*. Thus, in contravention of *Hicks* and other circuits which follow its teaching, the Third Circuit effectively eliminates two Federal Rules of Civil Procedure and usurps the power of the courts by preventing them from granting a motion

for summary judgment under Rule 56 or a motion for judgment as a matter of law, pursuant to Rule 50. *See* Federal Rules of Civil Procedure, 56 and 50.

Typically, in an employment discrimination case, a court must focus on whether "a genuine issue exists as to whether the defendant intentionally discriminated against the plaintiff." *Grimes v. Texas Dep't of Mental Health*, 102 F.3d 137, 139 (5th Cir. 1996). By focusing on the "correctness" of employer's articulated reason and making that the preeminent issue of material fact, the Third Circuit has changed the whole tenor of burden of proof and sufficiency of evidence despite this Court's ruling in *Hicks*.

> [O]nce the defendant has responded to the plaintiff's prima facie case, "the district court has before it all the evidence it needs to decide" *not* (as the dissent would have it) whether defendant's response is credible, but "whether the defendant intentionally discriminated against the plaintiff."

Hicks, 509 U.S. at 519, *citing Aikens*, 460 U.S. 711, 715 (internal quotation marks omitted by Supreme Court).

Rather than authorizing this dismantling of Rules 56 and 50, this Court emphasized that trial courts and courts sitting in review should not treat discrimination cases any differently, either in factual determinations or in allocation of burdens and orders of proof. *Hicks*, 509 U.S. at 523-25. The trial court still has the power to determine whether the ultimate issue of discrimination has been proven and to rule on the evidence as a matter of law.

> [T]o survive [employer's] summary judgment motion, [employee] had to adduce sufficient evidence to support a finding that [employer's] stated reason was not only a pretext, but that it was a pretext for illegal sex discrimination.
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> * * * *
>
> Even if we assume *arguendo* that this evidence is sufficient to support a finding of pretext, it could not, standing alone, possibly lead a reasonable jury to conclude that discriminatory animus was the real

> motivation behind [employer's] action. Title VII does not grant relief to a plaintiff who has been discharged unfairly, even by the most irrational of managers, unless the facts and circumstances indicate that discriminatory animus was the reason for the decision.

Smith v. Stratus Computer, 40 F.3d 11, 16 (1st Cir. 1994), *cert. denied*, 115 S.Ct. 1958 (1995) (citation omitted). To hold otherwise, as the Court of Appeals did, would give the jury, as factfinder, unfettered discretion whenever evidence of disbelief has been adduced. Clearly, this is not the holding of *Hicks*, and the Third Circuit's error is even more apparent when the procedural context of *Hicks* is considered. In reversing the Eighth Circuit in *Hicks*, this Court did not order the Eighth Circuit to affirm the district court's findings, as it would have done if the factfinder always has the last word in evaluating pretext evidence. Instead this Court simply remanded, explaining:

> Title VII does not award damages against employers who cannot prove a nondiscriminatory reason for adverse employment action, but only against employers who are proven to have taken adverse employment action by reason of (in the context of present case) race. That the employers' proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct. That remains a question for the factfinder to answer, subject, of course, to appellate review—which should be conducted on remand in this case under the "clearly erroneous standard of Federal Rule of Civil Procedure 52(a). . . ."

Hicks, 509 U.S. at 523-525.

The issue whether the employer is motivated by discrimination is reviewable like any other question of fact. After a bench trial, a trial court's finding of pretext-for-discrimination is reviewable for clear error.[4] After a

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[4] Upon remand the District Court in *Hicks* entered judgment for employer, St. Mary's Honor Center. The Eighth Circuit, in reviewing for clear error the District Court's finding of no racial dis-

jury trial, the jury's general verdict is reviewable under the standard for granting judgment as a matter of law. And before trial, the issue may be considered under the well-known standard that governs motions for summary judgment. *See Rothmeier*, 85 F.3d at 1335, n.9. As this Court has repeated time and again, trial courts and reviewing courts should not "treat discrimination differently from other questions of fact." *Hicks*, 509 U.S. at 524 (quoting *Aikens*, 460 U.S. at 716). That is precisely what the Third Circuit has done.

B. The Decision Below Prevents the Trial Courts From Performing Their Duty of Winnowing the "Chaff From the Wheat" To Ensure That Meritorious Claims Are Adjudicated While Unsubstantiated Trivial Ones Are Not

The Third Circuit would have every plaintiff who can meet the simple burden of a prima facie case and who can merely question the "rightness" of employer's reason for any employment action be entitled to a trial by jury. The "threshold inquiry" set forth by the Third Circuit prevents trial judges from exercising their authority to determine whether the evidence presented is sufficient to allow a meritorious litigant to have his day in court. This threshold inquiry prevents the trial court from dismissing any unsubstantiated claims which may congest the system, so as to prevent deserving plaintiffs from having their day in court. This decision harms, in particular, those individuals the civil rights acts were created to protect, while sheltering from the scrutiny of the trial court those disingenuous litigants who abuse the system and violate the law.

The Civil Rights Act of 1991 made money damages available to plaintiffs and thus, created additional incentives for individuals to file suit. Since its passage, the number of employment discrimination suits filed annually has increased almost threefold from 8,140 in 1991 to

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crimination, affirmed the lower court's decision. *Hicks v. St. Mary's Honor Center*, 90 F.3d 285 (8th Cir. 1996).

23,152, for the twelve month period ending September 30, 1996. *See* Administrative Office of the United States Courts, Reports of the Proceedings of the Judicial Conference of the United States (1991, 1996). Thus, while these various individuals may be seeking vindication of their rights in the workplace, the deluge of discrimination suits suggests that opportunism plays a role.

Who loses under the decision of the Third Circuit and who stands to gain? Under the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(5), Congress stated "that it shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited." The Third Circuit's decision effectively takes that priority away from those it was created to protect, by permitting evidence of pretext or the questioning of the employer's action always to survive a motion for summary judgment. Thus, meritorious plaintiffs will have to wait in line with others who may simply be taking their chances for the pot of gold. Similarly, this decision prevents innocent employers from defending themselves without paying the high cost of trial or potentially paying "nuisance value" to meritless cases, so as to avoid the cost. On the other hand, the guilty may take comfort in the knowledge that justice will be delayed.

Allowing the barrage of employee cases to go to the jury will lessen the impact of each individual case, as the watered-down claims are mixed with meritorious ones. Thus, plaintiffs who may be entitled to a fair and prompt adjudication of their rights may become invisible to a jury because of the glut of cases the Third Circuit and others would permit to proceed to trial.

Trial courts are uniquely qualified to determine whether claims made by plaintiffs present evidence sufficient to create a reasonable inference of discriminatory intent in order to defeat summary judgment. *Grimes*, 102 F.3d at 141. When the Court of Appeals suggests that a plaintiff automatically goes to a jury once he presents "threshold evidence" of disbelief of employer's proffered reasons,

it instructs the trial courts that they no longer should follow a traditional sufficiency of the evidence analysis. The Court of Appeals removes the trial court's discretion to decide that no reasonable jury viewing the evidence as a whole would find that an employer took an action because of discrimination.

CONCLUSION

Because the Court of Appeals contends that disbelief or pretext in conjunction with a prima facie case is sufficient to survive a motion for judgment, the decision of the jury, even without plaintiff proving discrimination, is final. This problem is exacerbated because unlike a bench trial, juries do not have to make findings of fact and conclusions of law. Thus, upon review of a jury verdict, a trial court cannot grant a motion for judgment as a matter of law, if there is evidence of pretext, disbelief or possibly mere disagreement. Because the trial court cannot query the jury about its determination to verify some finding of discrimination, pretext alone remains a mandatory "win" for plaintiff. This Court specifically rejected this approach in *Hicks* and must do so again. Mere pretext or disbelief cannot suffice in all cases to support a finding of discrimination.

For all of the foregoing reasons, EEAC respectfully requests that the Court grant certiorari in this case.

Respectfully submitted,

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